

LOWENSTEIN SANDLER PC
65 Livingston Avenue
Roseland, New Jersey 07068-1791
973.597.2540
Attorneys for Defendant
Cornell-Dubilier Electronics, Inc.

**HOME INSURANCE COMPANY,
PLAINTIFF,**

v.

**CORNELL-DUBILIER
ELECTRONICS, INC., ET AL.,
DEFENDANTS.**

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY**

Civil Action
Docket No. MER-L-5192-96

**CORNELL-DUBILIER
ELECTRONICS, INC., ET AL.,
PLAINTIFFS,**

v.

**UNITED INSURANCE COMPANY,
DEFENDANT.**

Civil Action
Docket No. MER-L-2773-02

**CORNELL-DUBILIER
ELECTRONICS, INC., ET AL.,
PLAINTIFFS,**

v.

**COLUMBIA CASUALTY COMPANY,
ET AL.,
DEFENDANTS.**

Civil Action
Docket No. MER-L-463-05

**REPLY MEMORANDUM OF CORNELL-DUBILIER ELECTRONICS, INC.
IN SUPPORT OF ITS SUMMARY JUDGMENT MOTION
AGAINST THE LONDON MARKET INSURERS
WITH RESPECT TO THE EXXON POLICIES**

In a thirty-nine page brief accompanied by a raft of affidavits, Exxon Mobil Corporation (“Exxon”) launches a barrage of arguments designed to make it seem as if there is some basis for resisting a determination that CDE is entitled to coverage under the Exxon Policies. Although voluminous, Exxon’s Opposition papers do not contain a single legitimate reason for forestalling the entry of summary judgment. It is especially disturbing that it is Exxon rather than Lloyds making the argument that the Exxon Policies do not provide coverage for direct claims by Exxon and its affiliates when there is overlapping coverage under a policy issued by Exxon’s captive, Ancon Insurance Company (“Ancon”).¹ Exxon litigated this precise issue in its coverage action against Lloyds in California state court, *Exxon Corp. v. Insurance Company of North America, et al.*, Civ. Action No. 971376 (the “California Coverage Action”). In that action, Exxon argued that the language in the Exxon Policies is unambiguous and that Exxon and its affiliates could elect to pursue direct claims under the Exxon Policies even when there was overlapping coverage under an Ancon policy. While Exxon, as a potential indemnitor of Lloyds, facing a significant exposure at the South Plainfield and Dismal Swamp sites, may now have strong motivation to reverse its position, it cannot fairly do so, particularly by attempting to rely on extrinsic evidence that brazenly seeks to vary and contradict the clear meaning of the Exxon Policies.

To assist the Court in sorting through the many arguments advanced by Exxon, CDE sets forth the following bulleted summary of Exxon’s contentions and CDE’s answers.

- *CDE’s rights in the Exxon Policies were commuted by a 2000 Settlement between Exxon and Lloyds.*

¹ Lloyds has not filed any response to CDE’s Summary Judgment Motion. Exxon has appeared exclusively on its own behalf as a potential indemnitor of Lloyds. Exxon expressly notes that it does not speak for Lloyds.

- **Even the authority relied upon by Exxon rejects Exxon's position and indicates that an insured's rights cannot be extinguished by a settlement where, as here, the occurrence has already happened.**
- *The underwriters of the Exxon Policies have not been brought into this case.*
 - **At least one underwriter from each of the Exxon Policies has appeared in this case from the beginning, and the Service of Suit provision in the Exxon Policies provides that a judgment against any underwriter is binding on all. Those underwriters received notice that CDE was seeking coverage under all policies issued by Lloyds. To the extent CDE did not specifically reference the Exxon Policies, it was because of the claims handling and discovery misconduct of those underwriters in failing to disclose the existence of the Exxon Policies for almost a decade.**
- *According to affidavit testimony, the Exxon Policies do not permit Exxon or an affiliate to make a direct claim when there is alternative coverage by Ancon.*
 - **Extrinsic evidence cannot be used to vary or contradict the plain language of the contract, particularly here, where Exxon asserts an interpretation of the Exxon Policies in this case that is the exact opposite of the interpretation it urged in the California Coverage Action a decade ago. As one of Exxon's affiants conceded at his deposition, Exxon's current interpretation of the Exxon Policies is not supported by the policy language.**
- *CDE, as part of a 1983 leveraged buyout, provided Federal Pacific Electric ("FPE") and its affiliates, including Exxon, an indemnity for losses resulting from CDE's environmental matters or CDE's operations.*
 - **CDE's 1983 Indemnity expressly excludes losses resulting from acts by FPE and its affiliates; whatever liability Exxon has in connection with this case is entirely the result of Exxon's own act in agreeing to indemnify Lloyds and is not within the scope of CDE's 1983 indemnity.**
- *The coverage in the Exxon Policies was extinguished in an endorsement, Endorsement 28, to a separate policy which was issued on November 1, 1984.*
 - **The coverage under the Exxon Policies cannot be extinguished by an endorsement to an entirely separate policy which was issued in 1984, a year after the expiration of the Exxon Policies. The endorsement to that 1984 policy said that the 1984 policy would not apply in certain instances but says nothing about changing the coverage of earlier policies.**

- *Coverage for the two New Jersey sites is barred by the “known loss” doctrine.*
 - **Under New Jersey law, coverage can be barred under the “known loss” doctrine only when both the claim for liability and the occurrence predate the commencement of the policy; here, no claim against CDE with respect to either of the two New Jersey sites was made prior to 1992, so there can be no known loss defense.**
- *The Exxon Policies contain a “Sue and Labor” provision on which no affirmative defense or discovery has been yet conducted.*
 - **A “Sue and Labor” provision provides the right and obligation of a policyholder to mitigate damages; Lloyds’ Answer has an affirmative defense based on mitigation of damages. In any event, issues of damages are not part of CDE’s motion since those issues are reserved to a subsequent phase of trial.**
- *CDE’s claims under the Exxon Policies must be arbitrated.*
 - **The Arbitration Provision in the Exxon Policies is not triggered until a request has been made by either the insurer or the insured. Only Exxon has requested arbitration; neither the insured, CDE, nor the insurer, Lloyds, has yet made a request. In any event, Lloyds’ right to arbitration would have been waived by its misconduct in waiting almost a decade to disclose the existence of the Exxon Policies. Furthermore, arbitration would permit re-litigation of many issues that would not be binding on the other insurers and thus would raise the real risk of inconsistent determinations, inefficiency, and delay.²**

ARGUMENT

A. Alleged Commutation of the Exxon Policies. In its initial moving papers, CDE noted that the June 30, 2000 Settlement Agreement and Release was ineffective to extinguish CDE’s rights and cited a large number of cases holding that a “mutual rescission of a liability policy by the insurer and the named insured does not abrogate the accrued rights of the omnibus insureds without their consent.” *Couch on Insurance* 3d vol. 2, § 31.49. In a desperate attempt to find any contrary authority, Exxon points to Section 311 of the Restatement (Second) of Contracts, “Variation of a Duty to a Beneficiary,” for the proposition that “the promisor and

² CDE’s arguments on the availability of arbitration are set forth in its Opposition to Exxon’s Motion to Stay.

promisee retain power to discharge or modify the duty [to an intended beneficiary] by subsequent agreement.” In relying on Section 311, however, Exxon neglects to mention that Comment e of that section explicitly rejects Exxon’s argument and endorses CDE’s position that an insurer and policyholder cannot by subsequent agreement extinguish the rights of other insureds with respect to occurrences that have already happened:

e. Effect of loss under insurance policy. The terms of the promise may make the beneficiary's right irrevocable in whole or in part or only upon a condition. Thus a reserved power to change the beneficiary of a life insurance policy terminates on the death of the insured. In general the power of promisor and promisee to vary the duty to a beneficiary under other types of insurance policies is understood to be subject to a similar limitation: **when an insured loss occurs, the power to vary the terms of the policy with respect to that loss is terminated.**

Illustration:

5. A contracts with B for liability insurance covering any person operating A's automobile with A's permission. C incurs liability covered by the policy. Thereafter A and B agree to rescind the policy. The attempted rescission does not affect the rights of C or the person to whom he is liable.

Restatement (Second) of Contracts, § 311, Comment e (emphasis supplied). As even the authority cited by Exxon shows, the June 30, 2000 Settlement Agreement and Release did not extinguish CDE’s rights to coverage for occurrences that happened prior June 30, 2000, which includes all of CDE’s claims in this action.³

B. Underwriters In The Case. In an effort to use Lloyds’ misconduct affirmatively as a defense, Exxon contends that CDE failed to give specific-enough notice that it was asserting claims under the Exxon Policies and failed to bring into this case the underwriters who participated in the Exxon Policies. Exxon’s contention is demonstrably wrong on both points.

³ CDE also argued that Lloyds was estopped from asserting that the Settlement Agreement discharged CDE’s claims because Lloyds had not disclosed the existence of the Exxon Policies in response to a 1999 discovery request which would have enabled CDE to protect its interests. Exxon makes the strange argument that CDE did not materially change its position in reliance on the Exxon Policies prior to the Settlement Agreement so there can be no estoppel. Exxon misconstrues the point. Had Lloyds properly disclosed the existence of the Exxon Policies in 1999 when it was required to in discovery, CDE would have been able to protect its rights from being potentially discharged by the June 30, 2000 Agreement by obtaining a court order or otherwise.

From the outset, CDE put Lloyds on notice that it was seeking the broadest possible coverage under any and all policies issued by Lloyds on CDE's behalf. CDE's initial notice letter to Lloyds in 1992 with respect to the South Plainfield Site demanded coverage not only under certain listed policies issued by Lloyds between 1959 and 1979 (the "Eleven Previously Disclosed Policies"), but also stated that CDE "claims coverage and makes a similar demand under all policies which you have issued on its behalf, even if not specifically listed." (Maniatis Cert., Exh. 3, at p. 2.) CDE's Crossclaims against Lloyds in this case likewise asserted claims against all underwriters who participated in any policies issued by Lloyds.⁴ CDE promptly followed up those Crossclaims with discovery requests which asked Lloyds to identify all policies issued on CDE's behalf whether in its own name or as a subsidiary. Notwithstanding CDE's assertion in its notice letter and in its Crossclaims that it was seeking coverage under all policies issued by Lloyds, and notwithstanding repeated discovery requests in this case, Lloyds concealed the existence of the Exxon Policies from 1992 until 2008. As soon as CDE learned of the existence of the Exxon Policies, CDE (along with FPE) wrote to Lloyds on November 21, 2008 and asserted that the Exxon Policies provided coverage to CDE (and FPE): "Those [Exxon Policies] provide literally hundreds of millions of dollars of coverage to [CDE and FPE] as subsidiaries of Exxon Corporation during the early 1980s." (Sanoff Supp. Cert., Exh. A, p. 1.)⁵ CDE went on to request a meeting with Lloyds to "see if the parties can promptly resolve [CDE and FPE's] claims." (Sanoff Supp. Cert., Exh. A, p. 4.)

⁴ CDE's Crossclaims were directed at the same insurers that Home Insurance Company had sued, excepting those insurers which had settled with CDE. (Maniatis Cert., Exh. 2, at p. 21.) In its Amended Complaint, Home sued "Certain Underwriters at Lloyds of London," which Home defined to include all underwriters which provided "one or more policies of insurance to CDE and/or FPE." (Home Amended Complaint, Maniatis Cert. Exh. 1, at ¶ 23; CDE Crossclaim.)

⁵ Documents referred to in this brief which were not submitted as an exhibit to a prior Certification are attached as exhibits to the Supplemental Certification of Robert S. Sanoff ("Sanoff Supp. Cert., Exh. ___"), filed herewith.

On this record, it is beyond dispute that CDE made clear to Lloyds at every point from 1992 until the present that it was asserting the broadest possible claims of coverage, including under the Exxon Policies. The liberal notice pleading rules in New Jersey do not require more than the allegations in the Crossclaims. *E.g., Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 75-77 (1990) (a pleading states a claim sufficiently whenever it fairly appraises the adversary of the claims and issues in dispute).⁶ Moreover, to the extent that CDE did not specify more explicitly in its Crossclaims that it was suing Lloyds with respect to the Exxon Policies, it was only because those underwriters prevented CDE from doing so. Not only did Lloyds have a duty in response to CDE's 1992 notice letter for the South Plainfield site to investigate and determine the coverage available to CDE,⁷ but beginning in 1999, CDE promulgated formal discovery requests to Lloyds which in the exercise of diligence should have resulted in the disclosure of the Exxon Policies.⁸ As this Court found in its June 26, 2009 Opinion, at p. 10, "[Lloyds] should have known that the Exxon policy existed after diligent discovery, and a failure to provide this policy amounts to a failure to 'partake in the discovery process in good faith.'" Where, as here,

⁶ Even if Exxon could fairly say CDE's pleadings did not provide notice of its intent to assert claims under the Exxon Policies, which CDE disputes, Exxon cannot credibly contend that CDE's Motion for Summary Judgment was the first notice CDE gave of its intent to seek coverage under the Exxon Policies. As soon as CDE learned of the Exxon Policies, it asserted its right to coverage in a November 21, 2008 letter (Sanoff Supp. Cert., Exh. A, p. 1), followed by a January 2009 Motion for Sanctions which sought an order estopping Lloyds from denying such coverage (Memorandum of Cornell-Dubilier Electronics, Inc. in Support of its Motion Against the London Market Insurers for Sanctions at 17 (Jan. 7, 2009)). It is beyond dispute that since at least November 2008, Lloyds has had express notice of CDE's intent to seek coverage under the Exxon Policies.

⁷ *E.g., Price v. New Jersey Mfrs. Ins. Co.*, 182 N.J. 519, 528-529 (2005) (reiterating the long-standing "desire for the fair exchange of information between the insured and the insurer to satisfy the covenant of good faith and fair dealing implicit in every contract").

⁸ For example, on June 7, 2006, CDE promulgated a Second Request for Production of Documents Directed to Insurers, including Lloyds. Item 2 of that Second Request sought: "To the extent not previously produced by you in this action, all liability insurance policies in which CDE and/or FPE were named insureds or otherwise covered parties (such as shareholder or subsidiaries)." Policyholders' Second Request for Production of Documents Directed to Insurers, June 7, 2006, (Exh. 10, 1/6/09 Sanoff Cert.) at 6. In its August 10, 2006, Response to the Second Request, Lloyds represented that the London Market Insurers had "produced all responsive underwriting documents in their possession relating to CDE and/or FPE." London Market Insurers Objections and Responses to CDE's and FPE's Second Set of Document Requests, August 10, 2006, (Exh. 11, 1/6/09 Sanoff Cert.) at 8.

an insurer has engaged in sanctionable misconduct in concealing the existence of insurance policies, that insurer cannot be heard to complain that the policyholder in its Crossclaims did not specifically identify those concealed policies. Any other conclusion would reward Lloyds' failure to partake in discovery in good faith and penalize the victim of that misconduct.⁹

Equally mistaken is Exxon's fallback argument that CDE has failed to bring into this case the necessary underwriters to obtain a judgment against the Exxon Policies. Specifically, Exxon tries to make much of the fact that although CDE stated claims against the underwriters of all policies issued by Lloyds, Lloyds, in its Answer, purported to appear only on behalf of those underwriters who subscribed to the Eleven Previously Disclosed Policies. Even assuming, *arguendo*, that the scope of a complaint can be unilaterally limited by the defendant's answer, it turns out that among the underwriters who have appeared in this case through Lloyds' Answer is at least one underwriter for each of the Exxon Policies. (Sanoff Supp. Cert., Exh. C.) The Service of Suit provision in each of the Exxon Policies says that "in any suit instituted against any one [of the underwriters] upon this contract, Insurers will abide by the final decision of such Court..." (e.g., Sanoff Cert., Exh. G1, at § 11). Because a judgment against one underwriter of an Exxon Policy is binding against all the underwriters of that policy, any decision with respect to the Exxon Policies rendered against the current parties in this case will be binding upon all of the underwriters of the Exxon Policies. Given that each of these underwriters was in the case

⁹ Although Exxon in its Opposition tries to suggest that it is somehow different from Lloyds, there is no basis for that suggestion. First, an indemnitor has no greater rights than its indemnitee. *Hess v. Hess*, 117 N.Y. 306, 309, 22 N.E. 956 (N.Y. 1889) ("The defendants, as his indemnitors, stand in his shoes"); *cf.*, *Cacioppo v. Boeing Co.*, 153 N.J. Super. 55, 361 A.2d 862, 865 (Law Div. 1977) ("[T]he rights of the subrogee 'arise no higher than those of the subrogor'..."). Second, Exxon does not come to this case with clean hands. On May 21, 2001, Allstate Insurance Company served a Subpoena *Duces Tecum* on Exxon requiring Exxon to produce "All comprehensive general liability insurance policies issued to Exxon Corporation or any of its affiliated companies under which Cornell-Dubilier Electronics, Inc./Federal Pacific Electric Company, UV Industries and/or Reliance Electric Company is an insured, named insured or additional insured or otherwise entitled to coverage under policies in effect during the period 1980 to 1986." (Sanoff Supp. Cert., Exh. B, at p. 2.) Surely, Exxon was required to produce the Exxon Policies in response to this Subpoena. In failing to do so, Exxon shares equally in the discovery misconduct which concealed the Exxon Policies for almost a decade.

and failed to disclose for almost a decade the existence of the Exxon Policies even though they underwrote those very policies, it is entirely fair to hold those parties to summary judgment fourteen years into this case.

C. Extrinsic Evidence. Recognizing that the plain language of the Exxon Policies establishes that CDE is an insured and has the right to assert either a direct claim for its loss occurrences or pursue a claim against Ancon which could then seek reinsurance under the Exxon Policies, Exxon has come forward with several affidavits which purport to contradict and vary the plain language. New Jersey law does not permit such extrinsic evidence. *See, e.g., Conway v. 287 Corporate Ctr. Associates*, 187 N.J. 259, 268, 269 (2006) (noting that “[i]n general, the parol evidence rule prohibits the introduction of evidence that tends to alter an integrated written document,” and further holding that under New Jersey law as announced in *Atl. N. Airlines v. Schwimmer*, 12 N.J. 293, 301-02 (1953), “[t]he admission of evidence of extrinsic facts is not for the purpose of changing the writing [and that where admissible] such evidence is adducible only for the purpose of interpreting the writing - not for the purpose of modifying or enlarging, or curtailing its terms”). Exxon cannot defeat summary judgment through extrinsic evidence that is calculated, not to interpret, but to change the terms of the Exxon Policies. *Chance v. McCann*, 405 N.J. Super. 547, 563-64 (App. Div. 2009) (trial court did not err in granting summary judgment where opposing party sought to introduce extrinsic evidence to change a term in a written contract).

The wisdom of prohibiting extrinsic evidence to vary the unambiguous terms of a contract is vividly illustrated here. In the California Coverage Action, Exxon took the position that the language in the Exxon Policies unambiguously gave Exxon and its affiliates the right to decide whether to pursue coverage for the same loss occurrence directly against the Exxon

Policies even where there is overlapping coverage under an Ancon policy.¹⁰ Indeed, in its Trial Brief in that California litigation, Exxon actually accused Lloyds of “ignor[ing] that which is obviously true by the express language of these policies – that they serve *both* as direct insurance of ExxonMobil and its affiliates, *and* as reinsurance to the extent stated in the policies.” (Exxon Trial Brief, Sanoff Supp. Cert., Exh. D, at p. 2.) Having settled its claims in the California Coverage Action and agreed to indemnify Lloyds subject to a reservation of rights, Exxon has now nimbly switched sides and argues the exact opposite of what it told the California court, illustrating the not-surprising proposition that, as a party’s interests change over time, so does its interpretation of its contracts.¹¹ This is exactly the reason that New Jersey precludes parties, like Exxon, from introducing self-serving extrinsic evidence that directly contradicts the language of their contracts.

In support of its new position about the meaning of the dual grant language in the Exxon Policies, Exxon tenders the affidavits of Peter Wilson, who worked for H.S. Weavers, and Thomas Chasser, who worked for Ancon and Exxon. Those affidavits offer convoluted exercises in wordplay calculated to try to make the words in the Exxon Policies mean the opposite of what they actually say. For instance, confronted with the endorsement to the Exxon Policies which states that Reliance is being added as an additional insured in return for the

¹⁰ In the California Coverage Action, Exxon sought to bring direct claims under the Exxon Policies for environmental claims of several of its divisions and one of its subsidiaries. When Lloyds disputed the coverage on the ground that those divisions and the subsidiary were also covered by an Ancon policy, Exxon took the position that it was free under the Exxon Policies to elect whether to assert a direct claim or a claim under the Ancon policy which in turn would bring a reinsurance claim under the Exxon Policies. (10/6/09 Sanoff Cert., Exh. 11, at pp. II.7-II.8; Exxon Trial Brief, Sanoff Supp. Cert., Exh. D, at pp. 13-19.)

¹¹ Although not relevant for summary judgment, it is especially troubling that Exxon has not only reversed its position 180 degrees, but that it does so in the face of deposition testimony from its own employees, as noted below.

payment of an annual premium of \$85,000,¹² Mr. Wilson opines that the words actually mean that Reliance is not an additional insured because Reliance was also covered by an Ancon policy:

9. With respect to the status of Reliance as an "Additional Insured," this denomination did not connote in this program that there was direct insurance for Reliance or any other Exxon affiliate that may have been included on additional insured Addendums. Rather, in a normal reinsurance program, the ceding insurer would be required to identify its insureds and the types of risks that might be covered under the reinsurance program. Because insurers were willing to provide maximum flexibility to Exxon, the insurers on the Exxon/Ancon insurance and reinsurance program did not insist on an identification that would later need to be amended as circumstances might change of those affiliates who would have direct insurance and those that would be part of the Ancon reinsurance program. Rather, the broker on behalf of Exxon and the insurers, documented the disclosure of the affiliate and its inclusion in the insurance and reinsurance program by simply issuing addendum identifying those affiliates as additional insureds. The actual status of those insureds under the program depended on whether a policy was in fact issued by Ancon.

Leaving aside whether Mr. Wilson's opinion is logical or comprehensible, it is this type of extrinsic evidence that New Jersey law prohibits because it attempts to vary and contradict the plain meaning of a contract. Significantly, at his deposition in this case on March 4, 2009, Mr. Wilson conceded that his interpretation of the Exxon Policies was not supported by the policy language. After offering his opinion that claims under the Exxon Policies were not available

¹² For example, Endorsement No. 14 to one of the 1980 Exxon Policies reads:

It is hereby noted and agreed to include Reliance Electric Company as a Named Insured under the policy, effective date to be advised.

In consideration of this agreement, additional premium hereon shall be daily pro rata of the following annual premiums:

<u>Layer</u>	<u>Premium</u>
\$10,000,000 excess of \$10,000,000	\$50,000 Annual
\$15,000,000 excess of \$20,000,000	\$ 5,000 Annual
\$25,000,000 excess of \$35,000,000	\$15,000 Annual
\$50,000,000 excess of \$60,000,000	\$15,000 Annual
\$50,000,000 excess of \$110,000,000	Nil
\$50,000,000 excess of \$160,000,000	Nil

(Sanoff Cert., Exh. 18, Endorsement 14.)

where there was coverage under an Ancon policy, Mr. Wilson was asked if there was language in the policies which said this. He responded, "I'm not aware of anything in the policy that says that." (Sanoff Supp. Cert., Exh. E, at p. 350.) Mr. Wilson also admitted that he was not aware of any contemporary conversations or writings on this point. (Sanoff Supp. Cert., Exh. E, at pp. 348-50.)

Like Mr. Wilson, Mr. Chasser offers conclusions in his affidavit that are at war with the actual language in the Exxon Policies. Mr. Chasser asserts that "where Ancon would issue a policy to Exxon or one of its affiliates, the Exxon/Ancon program would act only as reinsurance of Ancon."¹³ (Chasser Cert., ¶ 7.) In an attempt to support this conclusion, Mr. Chasser offers a convoluted interpretation of the phrase "and/or" in the Named Insured clause, which does not actually support his conclusion:

...the Named Insured clause in each of these policies had the phrase "and/or" between the identification of Exxon and its affiliated companies and Ancon, as a reinsured insurer. If Exxon chose to have some of its and its affiliates' risks covered by an Ancon policy and some by direct insurance under the Exxon/Ancon program, the operative word would be "and" in the "and/or" phrase because the program would be providing both reinsurance to Ancon and insurance to Exxon or its affiliates that did not have an Ancon policy. If Exxon decided to have no insurance through Ancon or to have all of its activities insured directly through Ancon, however, the operative word in the "and/or" phrase would be "or" because the program would be providing either all direct insurance or all reinsurance.

¹³ Although neither Mr. Wilson nor Mr. Chasser acknowledge it in their affidavits, it follows inexorably from their position that CDE was covered under the 1979 Exxon Policies since CDE became an "affiliate" of Exxon in 1979 and there was no Ancon policy at the time. Mr. Chasser expressly admitted this point in his August 22, 2006 deposition in this case, at pp. 54-55:

- Q. Is it your understanding that as of the time Exxon purchased Reliance Electric that Reliance Electric was automatically covered by an existing Ancon catastrophe policy?
- A. I believe the correct terminology would be that they were automatically covered by an Exxon Corporation catastrophe policy [i.e., the 1979 Exxon Policies].

(Sanoff Supp. Cert., Exh. F.) Additionally, to the extent that Exxon is serious about its contention that the endorsement adding Reliance to the 1980 Exxon Policies as of July 1, 1980 did not apply to Reliance subsidiaries, like CDE, then it also follows that CDE was automatically covered under the 1980 Exxon Policies at least until July 1, 1980, when the Ancon Policy became effective.

(Chasser, Cert., ¶ 8.) Deconstructed, all Mr. Chasser says is that the Named Insured clause gave Exxon the right to decide whether it would assert direct claims under the Exxon Policies or assert claims against Ancon which would in turn become reinsurance claims under the Exxon Policies. Nothing in this explanation supports the conclusion that, when Exxon or its affiliates were covered by an overlapping Ancon policy, the Exxon Policies would exclusively act as reinsurance. Remarkably, Mr. Chasser's interpretation of the Named Insured clause directly contradicts the very interpretation offered by Exxon in the California Coverage Action when Exxon told the court: "There is not the slightest hint in the policy language that by *adding* an explicit reference to Ancon as an insured [in the Named Insured clause], the effect is to *exclude* coverage for the principal named insured." (Exxon Trial Brief, Sanoff Supp. Cert., Exh. D, at p. 15) (emphasis in original).

Faced with policy language that does not in any way support their current interpretation, both Mr. Wilson and Mr. Chasser attempt to rationalize away the policy language by offering an economic explanation. According to their affidavits, it would not be economically optimal to have overlapping coverage since that might permit double recovery of claims or require the payment of extra premiums. This supposedly uneconomical result¹⁴ is the basis for Mr. Wilson's

¹⁴ Although not relevant for summary judgment purposes, it is demonstrably not true that there could be double recoveries if Exxon could elect to pursue direct or reinsurance claims under the Exxon Policies. Whether a given claim was asserted as a direct claim or as a reinsurance claim, only a single policy limit could be recovered under the Exxon Policies for each loss occurrence. Further, it is not clear that there would necessarily be any extra premiums since Ancon could charge the identical premium as the Exxon Policies for any overlapping coverage and then simply forward that identical premium to Lloyds. Additionally, Mr. Wilson and Mr. Chasser's insistence that there could be no reason why Exxon would want to have the option to assert direct claims when there was also coverage under an Ancon policy ignores the deposition testimony by the former head of insurance for Exxon in the 1960s and a senior executive at Ancon in the 1970s and early 1980s, John Cockshott, who noted that Exxon had a tax reason for the overlapping coverage:

A. I think there was a desire on the part of Exxon USA to be able to show a - a separate commercial policy in support of the premium payments they were making as opposed to, for example, a policy from Ancon which was an affiliated company.

Q. Why?

A. I think it just looked better.

argument that, when the Exxon Policies say that Reliance is being included as an additional insured for the payment of an extra premium, the Policies actually mean that Reliance is not being added. Similarly, Mr. Chasser argues that, when the Named Insured clause says Exxon “and/or” Ancon, the Exxon Policies actually mean Exxon “or” Ancon, since any literal construction of the actual wording of the Policies would produce the supposedly uneconomical result that Exxon would be paying for duplicative coverage.

At heart, Exxon is now arguing through the Wilson and Chasser affidavits that the extent of coverage under the Exxon Policies was not determined by the policy language but according to whether there was overlapping coverage in an Ancon Policy. Exxon in the California Coverage Action attacked precisely the argument that Wilson and Chasser make here:

In fact, no provision, definition, endorsement or exclusion in any of these policies suggests, much less compels, the conclusion that the extent of ExxonMobil’s direct coverage depends on facts completely extrinsic to the policies: namely the extent of limits available under a separate set of policies not even mentioned in these policies. If the parties had intended to make such a distinction, they could have done so in express language in the policy provisions.

(Exxon Trial Brief, Sanoff Supp. Cert., Exh. D, at p. 16.) Exxon was correct in what they said in the California Coverage Action; Mr. Wilson and Mr. Chasser cannot properly argue that the scope of coverage under the Exxon Policies depends not only on the language in the policies but on facts completely extrinsic to the policies, such as whether there is overlapping coverage in an Ancon policy. *See Conway* 187 N.J. at 269 (“[s]o far as the evidence tends to show, not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant”)

Q. To whom?

A. To -- for tax purposes and any other purposes.

Q. Whose tax purposes?

A. Exxon USA’s.

(4/1/98 Deposition of John Cockshott, Sanoff Supp. Cert., Exh. G, at pp.1203; *see also* 1/20/98 Deposition of John Cockshott, Sanoff Supp. Cert., Exh. H, at pp. 31-32.)

(quoting *Schwimmer*, 12 N.J. at 302). Had Exxon and Lloyds wanted to make the Exxon Policies provide only reinsurance for Ancon when there was overlapping coverage, surely they would have said so in the policies, not in affidavits submitted decades later.

Equally insufficient to defeat summary judgment is the extrinsic evidence from Ronald Stolle that Exxon never told Reliance that it was purchasing direct coverage on Reliance's behalf. (Certification of Ronald Stolle, ¶¶ 11-13.) The fact that Reliance did not know about the direct coverage in the Exxon Policies does not alter the fact that there was coverage. It may be true that Exxon kept tight control over the insurance coverage that affiliates had and how they exercised it, but that does not mean that the Exxon Policies did not provide Exxon and its affiliates the option to pursue either direct or reinsurance claims. Indeed, Mr. Chasser provided confirmation of this point in his deposition testimony from the California Coverage Action, which contradicts what he says in his affidavit here. Specifically in his deposition, Mr. Chasser explained that Exxon's Canadian subsidiary, Imperial Oil, like all affiliates, had the option of pursuing a direct claim under the Exxon Policies or under its alternative coverage which would eventually become a reinsurance claim, but that the decision as to which option was chosen was made by Exxon, not the affiliate:

Q. Now, in this time frame, 1980 to 1985, is it fair to say that Imperial had to make their initial claim against American Home?

....

A. I believe, like other affiliates they could make direct claims against [the Exxon Policies].

....

Q. How would an affiliate make a decision on whether or not to make the claim against either American Home or Airco on the one hand or [the Exxon Policies] on the other in the time frame 1980 to 1985?

....

A. I believe the corporation might have made that decision for the affiliate.

Q. And the Corporation is Ancon?

A. Exxon Corporation.

(1/11/99 Chasser Deposition, Sanoff Supp. Cert., Exh. I, at pp. 52-54.)¹⁵ As Mr. Chasser's testimony indicates, and as is reflected in the plain language of the Exxon Policies, Exxon purchased from Lloyds the flexibility to decide whether to make a direct claim or to pursue a claim under other insurance that would eventually lead to a reinsurance claim by Ancon under the Exxon Policies. Because it is no longer a subsidiary of Exxon, CDE is now free to exercise that flexibility on its own behalf.

D. Red Herrings. In its "throw-everything-but-the-kitchen-sink" strategy of opposing CDE's summary judgment motion, Exxon makes a series of desperate arguments that should not detain the Court long, as they can easily be shown to be meritless.

i. 1983 Indemnity. In 1983, CDE was purchased from its parent, FPE. As part of that purchase, CDE provided an indemnity to FPE and its affiliates, including Exxon, with respect to certain scheduled environmental matters and "other actions relating to the operation of the Company" (the "1983 Indemnity"). (Heckman Cert., Exh. 1, at p. 19.) Exxon makes the bizarre assertion that CDE's 1983 Indemnity would cover whatever Exxon might have to pay to Lloyds under its June 26, 2000 Settlement Agreement and Release, such that CDE's summary judgment motion against Lloyds should be denied. Without attempting to catalogue all the ways Exxon's assertion is defective, CDE simply notes that the 1983 Indemnity is subject to a key limitation that excludes losses resulting from FPE's and its affiliates' own acts: "the Indemnitees named in this section shall not be entitled to be indemnified against the consequences of their own acts or omissions or acts or omissions of any one or more of them unless such acts or omissions were known, agreed to or participated in by the Company, its directors, officers or

¹⁵ That Mr. Chasser's affidavit contradicts his prior deposition testimony from the California Coverage Action is an alternative ground for not permitting his affidavit to create a triable issue here. Under New Jersey law, it is well settled that a "sham affidavit," which contradicts prior deposition testimony, is not admissible to defeat summary judgment. *Shelcuskys v. Garjulio*, 172 N.J. 185, 201 (2002).

employees.” Plainly, whatever liability Exxon may have incurred in its June 26, 2000 Settlement Agreement and Release is the consequence of its own act and is excluded from the 1983 Indemnity.

ii. Endorsement No. 28. In perhaps its most desperate argument, Exxon contends that an endorsement to a policy issued by Lloyds to Exxon effective on November 1, 1984 -- a year after the Exxon Policies expired -- somehow commuted the coverage in the Exxon Policies. This is a frivolous argument that confuses an unrelated point made by CDE and FPE regarding Endorsement 19 to the Ancon Policy issued to Reliance. That Ancon Policy was a single policy that extended from 1980 to 1986, and Endorsement 19 -- issued in 1984 -- purported to alter the coverage “from the inception of the policy” (i.e., back to 1980). In stark contrast, Endorsement 28, on which Exxon relies, was an endorsement to Policy No. 4KA55450, which was issued only for the twelve month policy period November 1, 1984 to November 1, 1985, which postdates the Exxon Policies by a complete year. (Sanoff Supp. Cert., Exh. J.) By its terms, Endorsement 28 altered the coverage in Policy No. 4KA55450 and says nothing about limiting the coverage of any other policies.

iii. Known Loss. Exxon claims that summary judgment cannot be granted here because there are issues about a potential “known loss” defense. That is demonstrably not true. In New Jersey, insurance coverage can only be defeated on the grounds of the “known loss” doctrine where both the claim and the occurrence predated the issuance of the policy. In *Astro Pak Corp. v. Fireman’s Fund Ins. Co.*, 284 N.J. Super. 491, 498-99 (App. Div. 1995) -- relied upon by Exxon -- the court rejected the insurer’s known loss defense because no claim for liability had actually been brought against the plaintiff prior to the inception of the insurance policy. Further, the Third Circuit has explicitly rejected Exxon’s interpretation of New Jersey’s

known loss doctrine. See *Pittston Co. Ultramar Am. Ltd. v. Allianz Ins. Co.*, 124 F.3d 508, 516-19 (3d Cir. 1997) (reversing the lower court's holding that the known loss doctrine barred coverage where a potential liability was known but no actual liability had accrued). Applying *Astro Pak*, the Third Circuit held that under New Jersey law "certainty of legal liability, rather than certainty of damage, is required to trigger application of the doctrine." *Id.* at 518. There can be no argument that the claims against CDE for the South Plainfield and Dismal Swamp sites were asserted prior to the inception of the Exxon Policies. CDE did not receive notice of a claim involving the South Plainfield Site until 1992 (Maniatis Cert., Exh. 3), and it was not until 2001 that CDE first received notice of any Dismal Swamp claim (Sanoff Supp. Cert., ¶ 13).¹⁶ Plainly, there is no possible known loss defense under New Jersey law with respect to these two New Jersey sites.

iv. Sue and Labor Provision. Exxon argues that it needs discovery with respect to the Sue and Labor provision in the Exxon Policies because Lloyds did not include this provision as a defense in its Answer. (Exxon Opposition, at p. 25.) The Sue and Labor provision addresses a policyholder's right and duty to take steps to mitigate damages caused by a loss occurrence. Contrary to Exxon's contention, Lloyds' Answer in its Thirty-Second Affirmative Defense does include a failure to mitigate damages defense. (Maniatis Cert., Exh. 18, at p. 20.) Thus, Lloyds has already raised the defense contained in the Sue and Labor provision and has had ample opportunity to conduct discovery on this issue. In any event, CDE's summary judgment motion does not address the issue of the quantum of damages since all issues about damages have been

¹⁶ Exxon asserts that CDE made some admission that its claims after 1980 were barred by known loss. That is not an accurate characterization of a passing comment in a brief on a different issue regarding what CDE knew about environmental issues relating primarily to its New Bedford, Massachusetts operations. Whether or not such knowledge is sufficient to raise a known loss defense for a Massachusetts site, it plainly does not raise such a defense with respect to sites in New Jersey.

reserved to the allocation and damages phase of trial under the Court's Case Management Orders.

As much as Exxon tries to escape the language of the Exxon Policies with a blizzard of affidavits and legal arguments, CDE, as an affiliate of Exxon beginning in 1979, was covered under the Exxon Policies and has the right to pursue a direct claim under those policies notwithstanding the existence of some overlapping coverage under an Ancon policy that was issued to Reliance as of July 1, 1980.

CONCLUSION

For the above-stated reasons and the reasons set forth more fully in its initial papers, CDE respectfully requests that the Court grant its motion for summary judgment against Lloyds and determine that the Exxon Policies issued by Lloyds provide coverage to CDE for the South Plainfield and Dismal Swamp claims to the same extent that Lloyds has previously been found to owe CDE a coverage obligation under the Eleven Previously Disclosed Lloyds Policies.

Respectfully Submitted,

LOWENSTEIN SANDLER PC

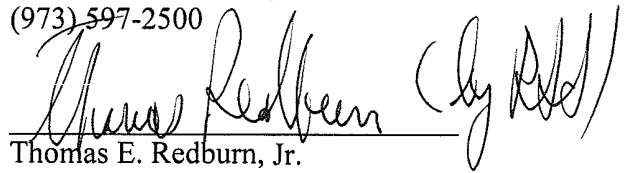
Thomas E. Redburn, Jr.

65 Livingston Avenue

Roseland, New Jersey 07068

(973) 597-2500

By:



Thomas E. Redburn, Jr.

Attorneys for Defendant

Cornell-Dubilier Electronics, Inc.

FOLEY HOAG LLP

Robert S. Sanoff

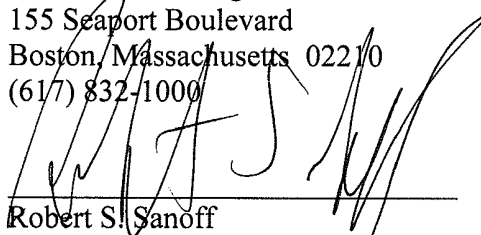
Jonathan M. Ettinger

155 Seaport Boulevard

Boston, Massachusetts 02210

(617) 832-1000

By:



Robert S. Sanoff

Attorneys for Defendant

Cornell-Dubilier Electronics, Inc.

Dated: August 24, 2010